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JOSEPH F. SPANIOL, JR.

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(4)
No. 87-1201

IN THE

Supreme Court of the United States

October Term, 1987

MYLES OSTERNECK, GUY-KENNETH OSTERNECK
and MYLES OSTERNECK and GUY-KENNETH
OSTERNECK as TRUSTEES for the BENEFIT of
ROBERT OSTERNECK,
Plaintiffs-Petitioners,

v.

ERNST & WHINNEY,
Defendant-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION

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LIST OF PARTIES

The parties to the proceedings below were the Petitioners Myles Osterneck, Guy-Kenneth Osterneck, and Myles Osterneck and Guy-Kenneth Osterneck as Trustees for the Benefit of Robert Osterneck (Plaintiffs-Appellants); E. T. Barwick Industries, Inc., M. E. Kellar, and B. A. Talley (Defendants-Cross Appellants); Eugene Barwick (Defendant-Appellee); and Respondent Ernst & Whinney (Defendant-Appellee).

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**SUPPLEMENTAL BRIEF OF
RESPONDENT ERNST & WHINNEY**

ARGUMENT AND CITATION OF AUTHORITIES

Petitioners have submitted a supplemental brief suggesting that the decision in *Buckanan v. Stanships, Inc.*, 56 U.S.L.W. 3645 (U.S. March 21, 1988) (No. 87-133) (per curiam) supports the grant of their petition for certiorari. Contrary to Petitioners' contention, *Buckanan* poses no conflict with the Eleventh Circuit's decision that Petitioners' motion for prejudgment interest is subject to Federal Rule of Civil Procedure 59(e). As

was true of the petition, the supplemental brief posits only false conflicts unworthy of this Court's attention. Accordingly, the petition should be denied.

The *Buckanan* case did not involve a motion for pre-judgment interest. It held only that Rule 59(e) was inapplicable to a motion for costs filed pursuant to Rule 54. Because Rule 54 independently authorizes assessment of costs, and Rule 58 expressly divorces that assessment from the entry of judgment, this Court found that a costs award does not alter or amend the judgment. 56 U.S.L.W. at 3646.

Neither the rule nor the rationale of *Buckanan* reaches Petitioners' Rule 59(e) motion for pre-judgment interest. No separate rule of civil procedure specifically contemplates motions for pre-judgment interest or divorces interest awards from the entry of judgment. Unlike the award of costs in *Buckanan*, the award of pre-judgment interest on Petitioners' securities claims was, in form and in substance, an integral part of the judgment on the merits and squarely within Rule 59(e). See Respondent's Brief in Opposition at 8-9.

Petitioners argue that any "relief" not specified by a statute creating a cause of action ought to be considered "collateral" to the merits, and hence outside Rule 59(e) and independently appealable. Supplemental Brief at 7-8. Petitioners' argument is particularly inappropriate where, as here, the right of action is judicially implied. Rule 59(e) is not meant to create separate appeals whenever a statute does not specify every element of available relief for a particular claim.

Were the Court to endorse Petitioners' "analysis" of "collateral matters," it would effectively repeal Rule 59(e) and Rule 4(a)(4) of the Federal Rules of Appellate

Procedure. A holding that an amended judgment awarding pre-judgment interest is "collateral to" the initial judgment, and thus outside Rule 59(e), would render the initial judgment and amended judgment separately appealable. The consequences of such a ruling would be unacceptably duplicative and unworkable for the courts of appeals. That is especially true in securities cases such as this one in which the propriety of a pre-judgment interest award cannot be evaluated without considering the same merits-based factors supporting the initial judgment on the merits. See Respondent's Brief in Opposition at 9; *Osterneck v. E.T. Barwick Indus., Inc.*, 825 F.2d 1521, 1526 (11th Cir. 1987).

Existing decisions of this Court already provide a suitable framework for deciding issues arising under Rule 59(e). The Eleventh Circuit's application of Rule 59(e) to Petitioners' motion for pre-judgment interest on federal securities claims is fully compatible with the decisions of this Court and those of other circuits. The petition should be denied.

CONCLUSION

For the foregoing reasons as well as those contained in Respondent's Brief in Opposition, the petition for a writ of certiorari should be denied.

Dated: Atlanta, Georgia
May 11, 1988

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served three copies of the within and foregoing Supplemental Brief of Respondent Ernst & Whinney upon all parties required to be served by depositing same in the United States Mail, postage prepaid, addressed to the following:

Paul Webb, Jr., Esq.
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This 11th day of May, 1988.

GORDON LEE GARRETT, JR.

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